IN THE

Supreme Court of the United States

No. 173

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

UNITED STATES SMELTING, REFINING & MINING COMPANY, DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY,

Appellees,

AND

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Appellants,

v.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, UNION PACIFIC RAILROAD COMPANY AND AMERICAN SMELTING AND REFINING COMPANY,

Appellees,

CONSOLIDATED CAUSES

BRIEF FOR INTERVENOR, THE COLORADO MINING ASSOCIATION

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INTRODUCTORY STATEMENT.

This Intervenor, The Colorado Mining Association, filed its Motion for Leave to Intervene and its Petition in Intervention (R. 401-407) as a party Plaintiff before the statutory Court in Case No. 1324 on June 18, 1947. Such Leave was granted by the Court by oral Order on the same date (R. 296) under and pursuant to Section 45a of Title 28 of the United States Code. Inasmuch as Cases 1324 and 1325 involved similar issues and like arguments, by Stipulation and with the approval of the Court, they

were consolidated for argument (R. 297 and 493-494). Upon the Court's holding that the Orders of the Interstate Commerce Commission were unlawful and void in these cases and remanding the cases to the Commission for further action, the Commission entered its Second Report on Reconsideration and Order based thereon, on May 18, 1948, which was attacked in Cases No. 1524 and 1525 before the same three-judge statutory Court, in which cases Intervenor again intervened (R. 431-437) with the approval of the Court (R. 445), which Court held the Second Order of the Commission to be unlawful and void. It is this Second Report on Reconsideration and Order based thereon which is before this Court at the present time.

The Findings of Fact and Conclusions of Law in consolidated Cases No. 1525 and No. 1524 (R. 455) provided

> "On hearing of these proceedings the parties hereto, with the approval of this Court, stipulated that the entire records in the respective proceedings before the prior statutory Court in Civil Actions, Nos. 1324 and 1325 should be considered incorporated by reference in the record of these proceedings as fully as if physically incorporated herein."

In its Petition in Intervention, The Colorado Mining Association adopted by reference all the allegations of the Plaintiffs' Complaint. Inasmuch as the position of the Intervenor in these cases is the same as that of the Plaintiffs, it would be imposing upon the Court to repeat the statements of issues involved and the arguments relied upon, which are ably set forth by counsel for the Plaintiffs in their Briefs. We adopt their statements of issues involved, their arguments and citations of authority in behalf of our position, and urge them most earnestly upon the Court. Did we not feel that such arguments in our behalf are being adequately presented to the Court by Plaintiffs' counsel, we would be most remiss in our duty if we did not state them, even at the risk of tiresome repetition.

for this Intervenor and those it represents are most vitally affected by these proceedings.

We will limit ourselves to those aspects of the case we believe to be especially applicable to our position, and emphasize only such arguments as we believe should be repeated from our own particular viewpoint.

Stated simply, the crux of the controversy so far as this Intervenor is concerned is this: The tariff of the railroad carrier for the transportation of ores and concentrates to the Leadville, Colorado, smelter of the Refining Company provided for years and now provides that *line-haul rates* to the smelter *include* certain terminal switching operations in the smelter area. The Commission in an endeavor to compel the railroads to charge for those switching operations *in addition to* the line-haul rates first made an Order based upon a Finding that the line-haul rates *do not* include switching operations. The statutory Court held that Order void on the specific ground that such Finding was in error, in that the evidence showed that the line-haul rates *do* include the switching operations referred to. Had the Finding been proper, the Order would have had a proper basis and would have been valid. The Commission then entered a second Order achieving the same results as the first Order, but boldly abandoning and expressly repudiating its Finding that line-haul rates *do not* include such switching operations, and apparently hoping by some permissive legerdemain to obtain approval of that Second Order, without the benefit of any relevant finding to sustain it, thus effecting a legal version of the Hindu rope trick. This second Order came before the same statutory Court, and was held by it to be void for the same politely reiterated reasons, in addition to a most persuasive new reason: that the Commission had foreclosed itself because the Findings of the Court with respect to the absence of a necessary basis for the Order desired by the Commission had become res adjudicata. From there the matter came to this Court.

ARGUMENT.

I. SHIPPING PUBLIC, VITALLY AND ADVERSELY AFFECTED, WAS AFFORDED NO OPPORTUNITY TO BE HEARD. THUS ORDER IS ARBITRARY, UNREASONABLE, CAPRICIOUS AND VOID.

II. ORDER OF THE COMMISSION UNLAWFULLY AFFECTS INTRASTATE MOVEMENTS, OR IT HAS NO SUBSTANTIAL PURPOSE.

III. FINDING THAT LINE-HAUL RATES *DO NOT* INCLUDE SWITCHING CHARGES IS ESSENTIAL TO VALIDITY OF ORDER OF COMMISSION. SUCH FINDING IS EXPRESSLY DISAVOWED BY COMMISSION, IS AGAINST THE EVIDENCE, AND WOULD BE BARRED AS RES ADJUDICATA, IF MADE. THUS FINDINGS 8 AND 9 OF THE COMMISSION (R. 320), VOID.

IV. CARRIERS MUST PERFORM SWITCHING SERVICES TO ASCERTAIN VALUES OF ORES, IN ORDER TO ASSESS FREIGHT CHARGES. THUS FINDINGS 1 TO 7 INCL., OF COMMISSION (R. 319-320), VOID.

I.

SHIPPING PUBLIC, VITALLY AND ADVERSELY AFFECTED, WAS AFFORDED NO OPPORTUNITY TO BE HEARD. THUS ORDER IS ARBITRARY, UNREASONABLE, CAPRICIOUS AND VOID.

This Intervenor is a composite of approximately 3,000 miners, producers of ore, and other persons interested in mining, most of them small, who are caught in the wheels of this controversy. They should not be lost from sight, for of all the parties to this litigation, they are the ones who will be most hurt in relation to their capacity to bear it, if the decision of the statutory three-judge Court should be

overruled and the Order of the Commission should be sustained.

Whether the Plaintiff smelting companies themselves could absorb the impact of a double freight rate attempted to be imposed by the questioned Order of the Commission is immaterial, as it is not theirs to absorb. That burden falls upon the members of this Intervenor Association and other producers and shippers of ore, and to many of them it is a matter of life or death. (Witness Carey: R. 1099 Ex. H-2) The plight of the producer is of course important to the smelting companies, for if through excessive freight charges the marginal mines of the West cannot operate, there is that less need for smelters. Likewise, the producers' status is of extreme importance to the railroads, for the destruction of marginal mining would deprive the rails of tonnage so derived.

The Colorado Mining Association is a non-profit Colorado corporation, composed of miners, mine owners, mining lessees, shippers of mineral products and other parties interested in the development of mining and production of minerals chiefly in Colorado, and in lesser degree, in all neighboring western states. Intervenor's purposes, stated broadly, include the protection and promotion of the mining industry in Colorado and in the West.

Most of the mines in Colorado are now so-called marginal in character. Many of them depended upon subsidies of the Federal Government in order to operate. (R. 1099 Ex. H-2) These subsidies, as this Court is well aware, have now been withdrawn. The picture is best presented by the Witness Carey (Freight Traffic Manager of the Denver & Rio Grande Western Railroad Company) (R. 1097-1099 Ex. H-2):

> "The Leadville Smelter is dependent entirely on Colorado ores, and because of the complex nature thereof and the fact that the smelter at Leadville cannot treat zinc and copper ores, it is extremely difficult

for them to secure a sufficient volume to keep in operation. . . . At one time some twenty-five smelters were located on the line of the Denver & Rio Grande Western in Colorado, at Silverton, Ouray, Rico, Durango, Gunnison, Leadville, Denver, Pueblo, Florence, Salida, Minnequa, Grand Junction, and Buena Vista. Today there is but one. That is the Leadville smelter. Inability to secure proper assortment of ores, and the dwindling supply thereof, were mainly responsible for this situation.

"The Denver & Rio Grande Western Railroad was primarily constructed for the purpose of serving the mining districts in Colorado and Utah, and in normal times the movement of products of mines has constituted the preponderance of tonnage handled by them. In the year 1922, products of mines constituted 75 percent of the total tonnage, and this has gradually dwindled until in 1940 this tonnage amounted to but 51 percent of the total.

"The Durango, Colorado, plant of the American Smelting & Refining Company closed in 1930 because of the inability to secure proper supply and assortment of ores. This forced the movement of ores from mines operating in Southwestern Colorado to other smelting points, much of it to the Leadville plant. By reason of the longer haul to Leadville, it, of course, was not possible to maintain the same freight rate structure as these mines formerly enjoyed into Durango, . . . and this condition placed many of the mines in the position of becoming so-called marginal operations, from what might have been termed profitable operations.

"*The situation at Leadville is precarious, and the imposition of the additional charges on the ore they now receive, most of which is marginal, is apt to result in the closing of the mines and resultant loss of this important industry to us.*" (Italics ours.)

At this point Examiner Way remarked (R. 1099 Ex. H-2) that the testimony of Witness Carey was

". . . wholly immatefial in this case. We are not here dealing with rates. The only subject that appears to be

before us is whether or not it is the duty of the carriers to switch these cars in the plant under the line-haul rates."

This remark of the Examiner is typical of the lack of interest shown in the plight of the producer from the beginning to the end of the proceedings before the Commission.

Certainly it would be far-fetched reasoning to say that the Order of the Commission which requires switching charges additional to those of the line-haul rates does not concern the matter of rates, when the only evidence in the case was to the effect that such switching charges *were included* in the line-haul rates.

These so-called marginal mines still in existence in Colorado cannot survive any appreciable increase in freight rates, and, as clearly appears, the arbitrary, unreasonable and capricious Order of the Commission does impose an appreciable increase in rates. This increase will be borne definitely and ultimately by the producers and shippers of minerals to the smelter at Leadville, and will not be absorbed by the Smelting Company nor by the public. Metal prices, the Court knows judicially, are fixed in the world markets and not by any combination of local costs of production, inclusive of freight rates. Thus the burden of any increase in rates is borne by the producing shipper.

As was pointed out in our Petition in Intervention, neither Intervenor nor any member in whose behalf it appeared, nor any producers or shippers of ore, nor the mining industry of Colorado in whole or in part were made parties to the investigation by the Interstate Commerce Commission, were notified or made cognizant of the hearing upon which the Order of the Commission was based, nor were extended the opportunity to be present and be heard at such hearing, *nor was there one single witness* called by

the Commission to testify in behalf of such producers or shippers.

When objection was made to the Court that no notice was given to any representative of the mining industry of the proceedings before the Commission, Mr. Dumbauld of counsel for the United States (R. 513) stated:

> " . . . as to notice, (to the mining public) there is no legal requirement of such notice, and certainly this Intervenor has access to the Traffic World and other trade publications and would have participated in the proceeding before the Commission if it had been thought that it had any interest in the matter why it should do so."

Such an impractical supposition that the marginal miner had access to, saw, or even knew of the existence of the Traffic World or any similar trade publication, is typical of the treatment accorded the producer throughout the proceedings before the Commission. The small miner is in no position to defend himself; he must and should rely upon the Commission to investigate his position and protect his interests. In these proceedings he was utterly ignored.

The mining industry of Colorado as a whole is interested seriously and perhaps vitally in the outcome of this proceeding. The Commission made no effort whatsoever to discover what effect, no matter how damaging, the proposed order would have upon that industry.

We cannot believe that the Commission itself actually feels that an Order should be sustained which compels a segment of the public so little able to bear it (the marginal producers of low-grade ore) to pay a doubled transportation charge (actually twice for the same service) without producing of its own motion, and having the benefit of, all relevant testimony the staff of the Commission could muster in behalf of that public. Surely an Order, achieving such a result, issued by a Commission whose very existence is de-

dicated to the protection of the public, without any effort whatsoever to ascertain the effect of that Order upon the shipping public, cannot be said to be other than arbitrary, unreasonable, capricious and void. It invades unlawfully the rights of the producers and shippers of ore and of the mining public, and should remain set aside.

II.

ORDER OF THE COMMISSION UNLAWFULLY AFFECTS INTRASTATE MOVEMENTS, OR IT HAS NO SUBSTANTIAL PURPOSE.

Practically all the traffic handled at the Leadville Smelter is intrastate. This conclusive statement of fact comes from one of the Commission's own witnesses, F. C. McDonald (R. 1107 Ex. H-2). Witness Carey for the railroad testified that during the years 1936 to 1941, inclusive, 95 percent of the movement was intrastate traffic; in 1942, 99 percent was intrastate, and in 1943 98.5 percent was intrastate. (R. 1096-1097 Ex. H-2)

Witness Hennebach (R. 1115 Ex. H-2), Superintendent of the Leadville Smelter, testified that for the 12 months ending March 31, 1944, 93 percent were intrastate movements, and 5 percent out of the remaining 7 percent of the movements originated in Colorado, becoming only technically interstate, leaving only 2 percent of the whole constituting movements originating out of Colorado. The 5 percent became technically interstate commerce because, although originating in Colorado, they could not move expeditiously by rail without traversing a small portion of New Mexico by way of in and out movement, enroute from origin points in Colorado to the smelter at Leadville, Colorado.

The movements involved are thus almost entirely intrastate and the Order of the Commission is either substantially without purpose, or it operates upon purely intrastate business. It would be arbitrary and unreasonable to main-

tain that the Order should become effective on 5 percent of the ores and concentrates moving from Colorado through New Mexico back to Colorado, while ineffective as to 93 percent of such ores and concentrates moving solely intrastate in Colorado, thus imposing discriminatory rates upon the shippers of the 5 percent of the ores and concentrates originating in Colorado. Based on 1944 movements, the Order would thus be left effective only as to 2 percent of the traffic, which is strictly interstate, and thus it becomes without practical efficacy or purpose. There was no semblance of a finding by the Commission, nor any attempt to arrive at a finding, that the rate situation with respect to the overwhelming intrastate character of the Colorado movements constituted a burden upon interstate commerce, or affected interstate commerce in any way or in any degree, adversely or otherwise. Surely admittedly the Order of the Commission cannot affect purely intra-Colorado movements unless it is found they constitute a burden upon interstate commerce, or affect interstate commerce, and no such findings were made. Hence the Order becomes purposeless, meaningless and void.

III.

FINDING THAT LINE-HAUL RATES DO NOT INCLUDE SWITCHING CHARGES IS ESSENTIAL TO VALIDITY OF ORDER OF COMMISSION. SUCH FINDING IS EXPRESSLY DISAVOWED BY COMMISSION, IS AGAINST THE EVIDENCE, AND WOULD BE BARRED AS RES ADJUDICATA, IF MADE. THUS FINDINGS 8 AND 9 OF THE COMMISSION (R. 320), VOID.

Insofar as this Intervenor is concerned, we deem it sufficient to discuss this aspect of the case upon the basis of the facts pertaining only to the Leadville, Colorado, smelter, the situation at that smelter being the one in which this Intervenor is most directly interested. Although this argu-

ment is applicable to the other smelters as well, the Leadville situation shows the fallacy of the Commission's action as simply, directly and unerringly as it can be shown. Therefore we shall confine our observations to this one situation.

Stripped of verbiage, the essence of the controversy insofar as the smelter of the American Smelting & Refining Company at Leadville is concerned, is as follows:

The uncontradicted testimony before the Commission showed that the line-haul charges to destination Leadville for approximately 40 years has included switching movements within the plant.

O. W. Tuckwood, General Traffic Manager of the Smelting company, testified that between 1908 and 1920 all the applicable tariffs provided under the line-haul rate not only switching in connection with road hauls such as weighing, thaw house, sampler, and final spotting, but also switching without charge between tracks in the plant itself—purely intra-plant switching (R. 946 Ex. H-2).

W. M. Carey, Freight Traffic Manager of the Denver & Rio Grande Western Railroad Company, testified that after 1920, and until the publication of the tariffs applicable to the Utah smelters in 1938, the tariffs all specifically covered a provision that the line-haul rate included movement to the thaw house, weighing, sampling and one spotting.

This testimony of these two witnesses stood alone and unquestioned. In the words of the Court:

> "The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates, and that the presently effective tariffs at Leadville continue so to provide."

(Finding 16 of Findings of Fact and Conclusions of Law. R. 456)

It is important to note that the tariff provisions effective at Leadville differ from those effective at Garfield and Murray, in that since November 27, 1920 and *now* the effective tariffs at Leadville expressly provide that *line-haul carload shipments*

> "will include movements of a commodity within a smelter plant over track scales, to and from thaw house, to and from a smelter sampler or to and from a combination sampler and concentrator to a designated unloading point indicated by the sampling company." (Item No. 15-A R. 1293)

The first Order of the Commission on Reconsideration entered October 14, 1946, attacked by Plaintiffs and Intervenors in Case No. 1324 as being unlawful, unreasonable, arbitrary and void, stated, in spite of the above uncontradicted testimony:

> "We conclude that the services performed within the plant area beyond the flat yard, as described herein, is an industrial service which respondent is not obligated to perform, and *for which it is not* compensated under its line-haul rates; and that performance of said services by respondent, without reasonable charge therefor, results in the industry receiving a preferential service not accorded to shippers generally." (R. 50 Ex. C-2) (Report of Commission on Reconsideration) (Italics ours)

In enjoining the above Order of the Commission as unlawful the Findings and Order of the statutory Court entered November 14, 1947, states in substance (R. 299):

> That the Commission based its Order on the premise that the line-haul rates *do not* cover transportation services rendered by the railroad company within the

respective plants; that such premise by the Commission is contrary to law, had no evidence to support it and that the sole evidence which would justify any finding upon that point is to the contrary.

After the holding of the statutory Court as aforesaid, the Commission then attempted, after vacating this invalid Order of October 14, 1946, through the Second Report on Reconsideration and Order based thereon, dated May 18, 1948, to avoid the findings of the Court that the previous findings of the Commission were without evidence to support them, by expressly disowning and disavowing its previous position and specific findings of fact made by it, in the following language (R. 368 Ex. N-2):

> "It is our purpose to make it entirely clear here that our order herein is based solely upon the findings herein, which in turn are based solely upon the principles and authority established with the approval of the Supreme Court in our original and supplemental reports in Ex Parte No. 104, Part II, and that *said order is not based in whole or in part upon any conclusions or findings in connection with tariff provisions or testimony as to whether the published rates are reasonable and do or do not include compensation for switching within the plant areas.* We hereby repudiate any reference or conclusion to the contrary conveyed by our discussion or evidence relative to such questions and the conclusions based thereon in our prior supplemental report herein." (Italics ours)

This Second Report on Reconsideration and Order based thereon is the basis of Plaintiffs' Complaints and Intervenors' Interventions in Cases Nos. 1525 and 1524.

It seems astounding to note the above disclaimers on the part of the Commission.

In one breath it expressly disavows the findings of its First Report and Order that line-haul rates *do not* include transportation services within the smelter areas, and then

in a second breath it immediately and doggedly falls back upon the basis of these same findings, in both Findings No. 8 and 9 of the Second Report, in an attempt to sustain its Second Order. Finding No. 8 of its Second Report and Order reads as follows (R. 375):

> That the common carrier transportation which respondents are obligated to perform begins and ends at the convenient points and that all services beyond those points in the plant areas are industrial or plant services *for which respondents should make reasonably compensatory charges.*" (Italics ours)

The very basis of the Order of the Commission presupposes a finding that the line-haul rates do not include compensatory charges, in spite of virtuous denials on the part of the Commission that such a finding is intended. That supposition was held to be against the evidence by the first statutory Court, and not being appealed from, that holding became res adjudicata. The Second Order falls of its own weight, without the semblance of even a void or unlawful finding to support it. The trial Court so held.

A finding that the line-haul rates *do not* include switching charges is a finding necessary and basic to a finding by the Commission of a violation of Section 6(7) of the Act. As said by the Court in Conclusion No. 4 of the Findings of Fact and Conclusions of Law in Cases Nos. 1525 and 1524 (R. 460):

> "The Commission by expressly disclaiming in its respective reports of May 18, 1948, any findings as to whether the line-haul rates of the plaintiff carriers do or do not include compensation for the terminal switching services here involved, and by expressly repudiating in its report in the American Smelting & Refining Company case its previous finding that the line-haul rates do not include such compensation, thereby deprived its respective findings of violations of Section 6(7) of the Act and its respective orders to cease and

desist from such alleged violations, of basic findings of fact essential to support such findings of violations of Section 6(7) and its orders to cease and desist from such alleged violations."

In its First Report and Order the Commission made the requisite Finding. When the Court told it there was no basis in fact for such a Finding, it attempted ostensibly to withdraw that Finding, still predicating its determination of a violation, upon the assumed existence of the same non-existent facts as were contained in the void Findings. This alternate affirmance, denial, and again affirmance of an alleged state of facts which has been held by the Court to be non-existent seems almost incredible.

To say the least, in view of the finding of the Court in the first cases that the line-haul rates *do* include the intra-plant switching involved, the Second Order of the Commission of May 18, 1949, requiring "reasonably compensatory charges in addition to the line-haul rates" certainly compels the producing and shipping public to pay twice for the same transportation services, and is thus unlawful and void.

IV.

CARRIERS MUST PERFORM SWITCHING SERVICES TO ASCERTAIN VALUES OF ORES, IN ORDER TO ASSESS FREIGHT CHARGES. THUS FINDINGS 1 TO 7 INCL., OF COMMISSION, VOID (R. 319-320).

There are 9 Findings in the Second Report of the Commission on Reconsideration, upon which the Order therein is based. Findings Nos. 8 and 9 have just been discussed. Findings Nos. 1 to 7, inclusive, relate to so-called excess service within the plant and are all predicated upon the correctness of Finding No. 1, which reads as follows (R. 374 Ex. N-2):

"That it is the duty and obligation of the smelters to obtain and certify to the carriers the values of ores for the purpose of ascertaining freight charges and that the carriers are not under any obligation or duty to perform any switching or other services for the purpose of ascertaining, or assisting the smelters in ascertaining, such values."

This Finding is specifically contrary to the evidence.

As herein noted, the exact wording of the tariff now in effect at Leadville includes switching operations within the smelter area for purposes which would be utterly useless were they not for ascertaining values. And the ascertainment of values is absolutely essential in the case of ores and concentrates for the assessment of freight charges (R. 912).

The Report of the Commission itself upon which the first Order was based, states (R. 33):

" . . . for the purpose of determining the freight charges, the value of the ore and concentrates, based on the dry weight, is converted to a wet weight basis and applied to the shipping weight."

Contrary to the Finding of the Commission with respect to the duty of the carrier to ascertain values, is the following testimony: Witness Carey for the railroad (R. 912).

" . . . it will be noted that in addition to having the weights, the railroads also must have the valuation of ore and concentrates before freight charges can be assessed. This is because of the fact that freight rates on these commodities are made on a graded scale according to valuation. While it is true this same information is a necessity for the smelting companies in making settlement with shippers, and the facilities, namely, the scales, thaw houses and samplers, are owned by the smelters, the railroads would have to supply them and operate them for their own purposes if the smelters did not."

Again Witness Carey testified (R. 913):

" . . . it is first necessary to determine the moisture content of this ore. That cannot be accomplished until the car has gone through the thaw house. . . . Let me explain first that the freight charges of the railroad company are assessed on the wet weight of that car as it first goes over the scales. Then it will go into the thaw house and the moisture is thawed out and the actual dry weight of that ore is ascertained then, so that the ores and concentrates are peculiar in that the samples have to be based on the dry weight, . . . "

Witness Carey (R. 914):

"Q. Now, Mr. Carey, if the weighing facilities and the sampling facilities, the thawing, and things of that kind were not provided for in the plant, would the carrier have to provide them out somewhere away from the plant?

"A. Yes, sir; under our present method of rates on ore, based on graded ore valuations.

"Q. So it would have to build them and maintain them for those purposes?

"A. Yes.

"Exam. Way: Is there any other way to make the rates so that the rates will cover the service?

"A. No, sir, not without closing down these marginal mines or working a hardship upon the railroad with respect to ores that will run a little higher in valuation. It would be possible to have shipments billed on a declared value for the purpose of assessing freight charges, but in that event, the shipper, of course, would take advantage of the rate on the lowest declared value. If the rates on valuations were eliminated and the railroads had one rate on ore and concentrates regardless of value, that rate would necessarily have to be so high that there wouldn't be any movement of the low grade ore, and the same thing would result.

Exam. Way: Why?

"The Witness: Because the ore couldn't afford to pay the higher freight charges, the low grade ore.

"Mr. Finerty: In other words, the small miner and the small mine producing a fairly low grade ore could

not afford to produce that ore if you had your rates on a single-rate basis?

"The Witness: That is correct.

"Mr. Finerty: And that would not only deprive the mines of an outlet for their product but deprive the railroads of that tonnage they now handle of low grade ore?

"The Witness: That is right."

Witness Tuckwood, for the Smelter (R. 950):

"As a private industry the railroads cannot compel the American Smelting & Refining Company, by tariff publication or otherwise, to reveal its assays in detail or supply weights secured on private scales in the absence of a specific agreement, which we have, of course. The smelting companies make no charge for furnishing weights, taking samples and supplying assay certificates to the carriers or settlement certificates, and this practice had its origin in the agreements made between the American Smelting & Refining Company, even before the smelters were built."

Again (R. 951):

"Q. Then it (Smelting company) also furnished the carrier with a translation of that dry weight basis into a wet rate basis of values?

"A. Yes, we do that for the carriers.

"Q. And the carriers then assess their charge on a translation of that wet weight basis?

"A. Yes, it always assesses bills on the basis of that wet weight value."

The testimony of the above two witnesses is the only testimony in the proceeding with respect to the Leadville smelter as to the duty to provide the intra-plant switching services necessary for the assessment of freight charges, and this testimony stands uncontradicted. How the Commission could arrive at the conclusion, from the testimony of these witnesses for both the railroad and the smelter, that "it is the duty and obligation of the smelters to certify to the carriers the values of ores...", passes our under-

standing. Thus the Findings of the Commission, Nos. 1 to 7, inclusive, are against the evidence and void. In the words of the Court (Finding of Fact No. 12. R. 455):

> "... the only evidence of record before the Commission was contrary to such findings and each of them."

Again, in Finding No. 16 (R. 456):

> "The uncontradicted evidence before the Commission was that for approximately thirty years prior to July, 1938, the tariffs of the plaintiff carriers expressly provided *that the specific terminal switching movements necessary to determine the value of inbound carloads of non-ferrous ores and concentrates were included in the line-haul rates*, and that the presently effective tariffs at Leadville continue so to provide." (Italics ours)

CONCLUSION.

We submit for the above reasons, among the others set forth by Plaintiffs, that the decision of the trial court is correct and should be sustained, and that this Court should affirm the permanent injunction restraining the enforcement of the Order of the Interstate Commerce Commission under date of May 18, 1948.

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